IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1978

NO. 78-492

REV. CHARLES H. NEVETT, et al.,

Petitioners,

v.

LAWRENCE G. SIDES, etc., et al.,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO REVIEW OF THE CAUSE SOUGHT BY PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

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Respondents (defendants in the District Court) do not challenge the portions of the petition for certiorari prior to the "Questions Presented for Review" on page 4, except we deem it necessary to cite under 1 (c), Rule 40 (which corresponds to the matter specified under 1 (d), Rule 23), two additional state statutes which we consider to be involved in this case; and also respondents challenge the right to attack the opinion and judgment of the Court of Appeals rendered on June 8, 1976, the petition for certiorari having been filed too late therefor.

ADDITIONAL STATUTES INVOLVED

The first involves the abolition by the Alabama Legislature of all "anti-single shot" requirements in municipal elections and is as follows:

Act No. 221, General Acts of Alabama of 1961, pages 2234, 2235, approved September 15, 1961, expressly repealed Act No. 606, Acts of Alabama, of 1951 page 1043, which required, in municipal elections, a ballot commonly known as an "anti-single shot", requiring a voter, in order for his vote to be valid, to express his choice for as many candidates as there are place to be filled. The pertinent portion of Act 221 is as follows:

> "Section 1. Whenever nominations for two or more offices of the same classification are to be made, or whenever candidates are to be elected to two or more offices of the same classification, at the same primary, general, special or municipal election, each office shall be separately designated by number on the official ballot as 'Place No. 1,' 'Place No. 2,' 'Place No. 3,' and so forth: and the candidates for each place shall be separately nominated or elected, as the case may be . . . Section 2. All laws and parts of laws in conflict with the provisions of this act, and Section 361, Title 17, Code of Alabama 1940, and *Act No. 606*, Acts of Alabama, Regular Session 1951, page 1043, specifically, are expressly repealed. . . ." (emphasis added).

The Act, while repealing the anti-single shot vote, retained place running for the two candidates in each ward.

The second Act is Act No. 248, General Acts of Alabama of 1945, page 376. It is cited because of a statement made in the petition pertaining to a claim that there was discrimination in the appointment by the City of classified (civil service) employees, particularly policemen and firemen. The Act limits the appointing authority (Fairfield in this case) from filling the vacancy except by selection from

three candidates submitted by the County Personnel Board created by the Act just cited. This Act will be referred to in the argument or place wherein petitioners claim there was discrimination on the part of the City against blacks in the selection of such classified employees, including firemen and policemen. The Act and the record to which we shall refer demonstrate the fallacy and inaccuracy of this statement. It is voluminous, and the pertinent text will be set forth in an appendix, as provided under Rule 40.

The principal applicable statute upon which Fairfield's election system was based in the elections of 1968, 1972 and 1976 is Section 426 of the Alabama Code of 1940, official as last amended in Section 3, Act No. 666, Page 111, Alabama Acts of 1961, amending the 1940 Code Section, by entirely rewriting it in full, including previous amendments.

The section as written in 1961 is correctly set out at page 3 of petitioners' appendix and is also correctly shown in the 1973 Supplement of the 1958 recompiled Code of Alabama (authorized and reliable but not adopted by the Legislature as an official code). The 1975 Code to which petitioners refer did not go into effect until October, 1977.

QUESTIONS PRESENTED FOR REVIEW

Respondents challenge the accuracy of the first two questions presented for review (petition, page 4).

Number 1 is as follows:

> WHETHER A FINDING THAT DILUTION OF THE MINORITY VOTE DOES NOT EXIST MAY BE PREMISED ON A CONCLUSION THAT BLACKS COULD BE SUCCESSFUL AT THE POLLS IF THEY WORKED HARDER THAN WHITES.

While the trial court's findings made following the remandment on the first appeal, dated June 11, 1976, contain the statement that the failure to elect any blacks to the thirteen member council in 1972 was not the result of past discrimination but rather the consequence of (a) a failure to turn out a higher percentage of black voters than white voters, (b) bloc voting, and (c) at-large voting for numbered places, the court's findings of absence of dilution are not premised upon that particular statement, and this is demonstrated by the paragraph in which the statement was made (page 230, 571 F.2d, Appendix to Court of Appeals opinion), as well as the remainder of the trial court's opinion, which paragraph is as follows:

> "(4) The plaintiffs have not proved that past discrimination precludes the effective participation by blacks in the election system. The discrimination made known to the court pre-dated the elections in 1968, in which six of the 13 persons elected to the council were black. The failure to elect any blacks to the thirteen member council in 1972 was not the result of past discrimination, but rather the consequence of (a) a failure to turn out a higher percentage of black voters than of white voters, (b) bloc voting, and (c) at-large voting for numbered places.

This isolated statement by petitioners merely says what should be obvious to everyone, and that is that the candidate who wins is the one who receives the higher number of votes, and the one who loses does so because he does not have a sufficient number of votes, for one reason or another, such as a failure of more voters to turn out to vote for him. The trial court's judgment was premised upon a conclusion and finding that the failure to elect blacks was not the result of the denial of the political process or of discrimination and that the evidence was not sufficient to show impermissible dilution of the black vote in the 1972

election. Therefore, respondents do not consider that this constitutes a sufficient statement of a sound, fundamental question presented for review.

Also challenged is the accuracy of Question Number 2, as follows:

> WHETHER THE DEFENDANTS IN A VOTING RIGHTS CASE ALLEGING DILUTION OF THE BLACK VOTE PREVAIL WHEN THE DISTRICT COURT MAKES A FINDING OF 'ULTIMATE FACT' THAT DILUTION HAS BEEN PROVED IN ACCORDANCE WITH THE STANDARDS SET OUT IN *WHITE V. REGESTER*, 412 U.S. 755 (1973), THOUGH NOT PROVED WHEN CONSIDERED UNDER PRECEDENTS OF THE COURT OF APPEALS.

Petitioners necessarily are referring to the trial court's findings after remandment, of June 11, 1976, 99a, because the opinion of the Court of Appeals, 533 F.2d 1361, was rendered June 8, 1976. No attempt to review it in this court was ever made and it is now too late to review the findings involved in the first appeal.

There is no showing in any of the opinions that the District Court, in *Fairfield*, on June 11, 1976, made a finding of "ultimate fact" that dilution had been proved in accordance with the standards set out in *White v. Regester*, 412 U.S. 755 (1973), 37 L.Ed.2d 314, 93 S.Ct. 2332. The finding of fact in *White* with reference to the situation of the blacks in Dallas County is shown on page 766 of 412 U.S., 37 L.Ed.2d 324, and includes the following:

> "With due regard for these standards, the District Court first referred to the history of official racial discrimination in Texas, which at times touched the right of Negroes to register and vote and to partici-

pate in the democratic processes. 343 F Supp, at 725. It referred also to the Texas rule requiring a majority vote as a prerequisite to nomination in a primary election and to the so-called 'place' rule limiting candidacy for legislative office from a multimember district to a specified 'place' on the ticket, with the result being the election of representatives from the Dallas multimember district reduced to a head-to-head contest for each position. These characteristics of the Texas electoral system, neither in themselves improper nor invidious, enhanced the opportunity for racial discrimination, the District Court thought.[10] More fundamentally, it found that since Reconstruction days, there have been only two Negroes in the Dallas County delegation to the Texas House of Representatives and that these two were the only two Negroes ever slated by the Dallas Committee for Responsible Government (DCRG), a white-dominated organization that is in effective control of Democratic Party candidate slating in Dallas County.[11] That organization, the District Court found, did not need the support of the Negro community to win elections in the county, and it did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community. The court found that as recently as 1970 the DCRG was relying upon 'racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the black community.' Id., at 727. Based on the evidence before it, the District Court concluded that 'the black community has been effectively excluded from participation in the Democratic primary selection process,' id., at 726, and was therefore generally not permitted to enter into the political process in a reliable and meaningful manner."

It is shown, inter alia, that blacks could not have themselves slated as candidates.

Since petitioners urge this same point in their Statement of the Case, we feel justified in reciting the findings of fact

in *White v. Regester* prior to the argument and at this point, hoping for the Court's approval.

The finding of the plight of the Mexican-Americans in Bexar County is shown commencing on page 767 of 412 U.S., page 325, 37 L.Ed.2d, and consumes a substantial portion of the next page. Aside from a long history of denial of access to the political process, the Bexar County community (including the Mexican-Americans) " 'had long suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, *politics* and others.' " (quoting from the District Court's opinion at 343 F Supp, at 728) (emphasis added). There was a cultural and language barrier in an area of poor housing, low income and high rate of unemployment, and " 'the most restrictive voter registration procedures in the nation.' "

No factors comparable in the least to the conditions in Dallas and Bexar Counties, Texas existed in Fairfield, Alabama at the time of the 1968 election, or the 1972 election which is under attack in this case. All one has to do is to read the opinion applicable to the *Fairfield* case in that regard.

The voting system created by the Legislature for municipalities like Fairfield, §426, et, seq., Title 37, Alabama Code of 1958 (Alabama Code of 1940, as amended)[1] makes no provision for slating of candidates whatsoever and no nominations by any political party. Anyone who desires to run and is otherwise eligible may run for office by throwing

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[1]While the applicable Code section is purportedly set out in the petitioners' appendix at page 144, the reference there made is to a section of the Code of 1975, not in existence at the time of the 1972 election. However, the wording appears to be the same. Section 426, Title 37, numbered in the applicable Code, is referred to as such in all of the briefs throughout the course of the litigation. The correct citation is §426, Title 7, of the former Code, elsewhere referred to.

his hat in the ring. A further statement is made on page 7 of the petition in the Statement of the Case that after remand on the first appeal the District Court then made a finding of "ultimate fact" that plaintiffs had established a case of dilution of black voting strength under *White v. Regester*. This we shall controvert when we reach a discussion of the Statement of the Facts. The statement is incomprehensible and it does not present a legitimate question for review, respondents submit.

Respondents' view of the questions presented for review is whether the evidence was sufficient to show impermissible dilution under the Fourteenth or Fifteenth Amendments of the black voting strength. Integrally connected with that question is whether the findings of the District Court of June 11, 1976 (571 F.2d 209, set out as an appendix to the Court of Appeals opinion), described by petitioners as "Nevett B" and set forth commencing at page 59, petitioner's appendix, upon which was founded the judgment from which the appeal was taken, were clearly erroneous. The Court of Appeals held they were not.

The ultimate question is whether the plaintiffs have shown a reason for review under Rule 19, or otherwise. Respondents contend that no sufficient reason has been shown.

We have no complaint pertaining to the wording of Questions 3 and 4 relating to the subject whether there must be proof of an intent to discriminate against blacks as far as the abridgment of the right to vote is concerned under the Fourteenth and Fifteenth Amendments. Respondents contend, as held by the Court of Appeals, that purposeful discrimination is an essential element for success.

STATEMENT OF THE CASE

The Statement of the Case of the petitioners, on pages 5-10, contains for the most part, aside from the history of the litigation and the results of each proceeding, petitioners' interpretation as to what each *Fairfield* decision means, with much of which defendants disagree.

It is true that Fairfield is an industrial suburb of Birmingham, much of its population consisting of workers of the Tennessee Coal and Iron Company, a division of the U.S. Steel Corporation.

There is no claim that blacks were economically disadvantaged, or that there were poorer educational and economical opportunities or conditions.

At the time of the 1970 census preceding the 1972 election, the City had a population of 14,369, as stated, and six wards, with two councilmen residing in each ward, total of twelve, and the one president of the council, all to be elected by an at-large vote, and from numbered places, the candidates running for places 1 and 2 *in each ward*.

Petitioners state on page 5 that all blacks, while defeated at the polls in 1972 by a city-wide majority, usually carried their own wards. There is nothing in the record before this Court to show that that is a fact, and it must be borne in mind that in order for any candidate to be elected, his candidacy must be voted upon by all of the voters in the city, both white and black.

Under §426, Title 37, Alabama Code of 1940, as amended, applicable at the time, in cities with population of 12,000 or more, but less than 20,000, and having less than seven wards (Fairfield had six), it was mandatory that two resident aldermen or councilmen from each ward be elected by all of the voters of the city. In such cities having more than seven wards, one alderman would be elected from

each ward, and in such case a sufficient number of aldermen from the city at large would be elected to make the total number of aldermen fourteen, exclusive of the president of the council; and in cities having 50,000 population or more the city council may create not exceeding twenty wards, with other population provisions.

The cities were governed by different provisions according to their population and number of wards, as shown by the statute, and it is for that reason that the trial court, in its second judgment rendered on June 11, 1976 *(Nevett B,* 59a, better read in the appendix to 571 F.2d commencing at page 230), described the state's policy underlying the preference for the multi-member or the at-large districting as tenuous. Although the trial court decided that this one factor was shown, he effectively decided that the other main factors prescribed in *Zimmer (Zimmer v. McKeithen,* 485 F.2d 1297 (5th Cir. 1973)) had not been proven in the aggregate, including the enhancing factors, and that the plaintiffs had not made out a case for dilution, with judgment for defendants. While at page 227 in *Nevett v. Sides,* 571 F.2d, the opinion states that the appellees (defendants) "do not challenge the finding that the state policy behind at-large districting is tenuous", the Court is mistaken in that because on page 32 of the brief of appellees (defendants) we stated clearly our view that:

> ". . . the policy in favor of at-large voting is not 'tenuous' from the standpoint of Zimmer . . . 'Tenuous' means 'weak', 'flimsy' or 'without substance', according to the dictionary, but we submit that the meaning is to be considered in the light of 'racial' discrimination, under *Zimmer* definitions."

This is the construction placed upon the term in *Bradas v. Rapides Parish Police Jury,* 508 F.2d 1109, Fifth Circuit, February 14, 1975. After discussing the lack of existence

of the other factors in *Zimmer,* the Court, in *Bradas,* said (Judge Simpson):

> "The record does not evidence a state policy favoring multi-member districts that is rooted in racial discrimination, nor does it indicate a lack of responsiveness on behalf of elected officials to the particular concerns of the black community."

The District Court, following remand, held (briefly stated), pertaining to the four major factors in *Zimmer,* at p. 229, *Nevett v. Sides,* 571 F.2d:

1. Plaintiffs have not demonstrated any lack of access to the process of slating candidates, for in Fairfield there has been no slating. More to the point, the evidence has not shown that blacks in recent years have been denied access in any parts or phases of the election processes in Fairfield, e.g., qualifying as candidates, campaigning, voting (this includes registration, 59, 60a).

2. It has not been demonstrated that there has been "unresponsiveness" by City officials to the "particularized needs" of blacks (60a).

3. The Court held that the state policy pertaining to any preference for at-large voting in municipal elections is "tenuous", a matter which we have previously discussed.

4. Plaintiffs have not proved that past discrimination precludes the effective participation by blacks in the election system.

After considering the "enhancing factors" the Court concludes that there was no proof in the aggregate, considering all factors, that there was impermissible dilution of black votes under the Fairfield election system (65a), and after noting that there has been no evidence that the "claimed dilution was the result of any invidious discriminatory purpose," Cf. *Washington v. Davis,* 426 U.S. 229,

96 S.Ct. 2040, 48 L.Ed.2d 577 (1976), rendered judgment for the defendants (65a).

Washington v. Davis was decided just prior to June 11, 1976, the date of the District Court's judgment.

Suffice it to say that whenever a small city, with population between 12,000 and 20,000, covering an area of three square miles, electing to have less than seven wards (having any more in a city of that size would be impracticable), the state law makes it mandatory that two councilmen from each ward (residing therein), and the president of the council (residing anywhere in the city), be elected by the voters at large. With all deference, we think the District Court misconstrued the term "tenuous" as used in *Zimmer*. However, because of the holding, both of the District Court and the Court of Appeals in their last two decisions, the meaning of the word "tenuous" in *Zimmer* is a matter of little import in our case.

The action was filed in 1974 and the first judgment of the District Court rendered on February 20, 1975 in favor of the plaintiffs. Its opinion is shown as Appendix A at the end of the opinion of the Court of Appeals rendered on June 8, 1976 (the case was argued in May 1976), *Nevett v. Sides,* 533 F.2d 1361 (appendix commencing at 1366). The opinion of the Court of Appeals in *Nevett v. Sides,* first appeal, was rendered on June 8, 1976. On June 11, 1976 there was a hearing before United States District Judge Sam C. Pointer, Jr. following remand, at which no additional evidence was taken and none requested. The councilmen whose offices were challenged in the suit were elected in August of 1972, and a new election was scheduled for August, 1976. The election was held and new councilmen were elected under the same plan and are now serving. The appeal from the District Court's judgment of June 11, 1976 was heard on June 13, 1977 before the Court

of Appeals and judgment and opinion affirming the District Court's judgment (571 F.2d 209) was rendered on March 29, 1978. This, of course, is the opinion which gave rise to the present petition for certiorari. This case does not involve any attack whatsoever upon the council elected in August of 1976, and the effect of the actions taken by that council, if it were held they were not validly elected, is almost unimaginable.

The course of this case has involved two trial court judgments, two opinions of the Court of Appeals, over a period of over four years, before reaching this Court.

On page 6 the petitioners state that the District Court, in the case on first appeal, found that the at-large election system, coupled with racially polarized voting, 'operate[s] to minimize or cancel the voting strength of the blacks in the City of Fairfield,' and that the District Court "made explicit findings under each of the criteria set out in *Zimmer v. McKeithen,* 485 F.2d 1297 (5th Cir. 1973) (enbanc) *aff'd sub. nom. East Carroll Parish School Board v. Marshall,* 424 U.S. 6363 (1976), but found it necessary to return to the 'basic standards' of *White v. Regester,* 412 U.S. 755 (1973)." A portion of the quotation, that is, what the Court said, may be correct *(Nevett A,* 122a), but it is hardly accurate to say that the Court found it necessary to return "to the basic standards" of *White v. Regester.*

The District Court, as has been pointed out in the petition, stated that he considered what was said in *Zimmer* to be merely guidelines but, in effect, not binding, and he construed *White v. Regester* as meaning that the effect of an at-large election in which black candidates were not elected, although constituting a high percentage of the population, in itself constituted a dilution of the black vote. The trial judge made statements in his opinion to show that was the way he felt, and the Court of Appeals, at page

1365, 533 F.2d, characterizes the District Court's opinion as insufficient to support the judgment for the plaintiffs and, in effect, as misconstruing *White v. Regester*, saying:

> "As the Supreme Court said in *Dallas County v. Reese*, 421 U.S. 477, 95 S.Ct. 1706, 1708, 44 L.Ed.2d 312, 315 (1975):
>
> '[A] successful attack raising such a constitutional question must be based on findings in a particular case that a plan in fact operates impermissibly to dilute the voting strength of an identifiable element of the voting population.'
>
> Such findings must be based on the criteria that the *Zimmer* and *Wallace* courts distilled from *White v. Regester*, 412 U.S. 755, 765-767, 93 S.Ct. 2332, 2339-2340, 37 L.Ed.2d 314, 324-325 (1973) and in accordance with all later cases. Unless those criteria in the aggregate point to dilution, i.e., if the criteria 'don't really help', then plaintiffs have not met their burden, and their cause must fail. Specifically, the trial court's findings may be read as indicating that elections must be somehow so arranged—at any rate where there is evidence of racial bloc voting—that black voters elect at least some candidates of their choice regardless of their percentage turnout. This is not what the constitution requires. Therefore, we remand to the district court to reconsider its findings according to the indicia of dilution stated in *Zimmer* and other cases and to redetermine the ultimate question of dilution *vel non* in light of its conclusions with respect to these criteria."

With reference to the District Court's findings, actually favorable and certainly not unfavorable to the defendants, the opinion said (page 1364, 533 F.2d):

> "The relevant fact findings were either intermingled with or preceded Judge Pointer's conclusions of law. None of the findings of fact, considered separately from the intermingled conclusions of law, can be set aside as clearly erroneous."

While the District Court in his first opinion considered the criteria in *Zimmer*, finding none of them in favor of the plaintiffs, expressing doubt only as to the issue of unresponsiveness and stating that the criteria did not help one way or the other (although finding that there was no racially motivated law or action), his conclusion was that if the voting plan had the effect it had in the Fairfield situation, this was sufficient for a finding of dilution. Whatever was said in the first judgment, vacated by the Court of Appeals, was not sought to be reviewed here, and the time for review appears to have long ago expired.

On page 7 petitioners state that on remand the District Court made a "finding of 'ultimate fact' that plaintiffs had established a case of dilution of black voting strength under *White v. Regester* . . . . ", a remarkable statement indeed.

This was one of the questions that petitioners raised as being presented for review and accounts for our having quoted the findings in *White v. Regester*. Petitioners' attorneys are evidently referring to the language of the District Court in his second opinion, page 230, 571 F.2d, as follows:

> "When this court entered its earlier decision, it did so in the belief that 'dilution' was established upon proof that (a) in a city where blacks constituted a majority of the voters in some of the districts but slightly less than 50% of the voters for the city as a whole, (b) where voting rather strictly followed racial lines, (c) a 'winner-take-all' election system by at-large voting for numbered places resulted in practice (d) in an all-white governing body, (e) whose decisions, *though without indication of fraud or bad faith*, quite understandably tended to reflect their own perspectives and the attitudes of those who elected them, to

the relative detriment of the black minority, (f) including such matters as appointments to other boards and agencies of the city. The court was of the view that such evidence demonstrated that the black plaintiffs 'had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.' *White v. Regester*, 412 U.S. 755, 766, 93 S.Ct. 2332, 2339, 37 L.Ed.2d 314 (1973). The court thought that the factors outlined in *Zimmer* were to be taken as indicia of—but not necessarily the determinants of—'dilution'." (emphasis added).

We have underscored the words "though without indication of fraud or bad faith" which are in addition to words in the first opinion in which the court stated that the effect was the important thing and should govern, even though neither the state nor the city officials of Fairfield intended to discriminate (the substance of his words).

The gist of the trial court's second opinion was that under the evidence the aggregate of the factors prescribed in *Zimmer* had not been proved. The Court's last statement and holding was "there had been no evidence that the claimed 'dilution' was the result of any invidious discriminatory purpose. Cf. *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). Judgment in favor of the defendants will be entered by separate order." *Washington v. Davis* was handed down a few days before the June 11, 1976 judgment.

Neither this finding nor any other language that the Court has used states that the Court has found as an "ultimate fact" that plaintiffs had established a case of dilution under *White v. Regester*. We invite petitioners to point out to us where those words have been used. Whether the District Court had correctly or erroneously construed the meaning of *White v. Regester*, he has still made no finding

of "ultimate fact", under *White v. Regester*, in any sense. The most that can be said is that petitioners evidently conceived that *White v. Regester* was to be construed as meaning that there need be no racial motivation in prescribing an at-large system, that if the result is that no black candidate is elected, this proves dilution.

Petitioners state, at page 8, that with the assistance of federal registrars blacks achieved during 1968 and for the election that year a 53% majority of registered voters, and elected six blacks (all that ran except for president of the council) to the thirteen member city council (undoubtedly with the bloc voting on the part of the blacks at that time they would have elected twelve candidates, exclusive of the president of the council, if that many had run), and they say that by 1972 blacks constituted 48% of the registered voters. While a statement to that effect was evidently made by the trial judge, 122a, this is effectively contradicted by other sources in the case. In fact, the blacks constituted a few more than 50% of the registered voters in Fairfield in the 1972 election. In characterizing the Court's determinations as to the percentage of registered voters, the Court of Appeals, in *Nevett v. Sides*, 533 F.2d 1365, in fn. 3, said:

> "The court determined that blacks represent 48% of the population in Fairfield and have *at least 50% of the registered voters*—while the figures show that blacks have 500 fewer registered voters, the lower court found that since federal registrars registered 585 voters under the Voting Rights Act, most of those presumably black, blacks have at least as many, if not more, registered voters now; that blacks had won six of the thirteen council positions in 1968, which was the first time, with one exception, that any black had won a position on the council; that no blacks won in 1972, but that if blacks had voted in the same percentage as whites, they would have elected nine council members (assuming bloc voting); and that there has been sub-

stantial bloc voting. The foregoing is paraphrased from the Appendices." (emphasis added).

This footnote in *Nevett v. Sides (Nevett I)* as to the additional 585 votes in the 1972 election, presumably black, was in all probability taken from the evidence in the first trial, and a statement made therein by the district judge.

On pages 60 and 61 of the appendix in the Court of Appeals in the testimony of Jerry D. Coleman, plaintiffs' witness, he counted the number of white and black registrants comprising categories 1, 2, 3 and 4, the regular registration lists, as showing a total number of 3,794 whites and 3,212 blacks, at the time of the 1972 election, a total of 7,006. However, in categories 5 and 6, representing federal examiner registrants, there were 585 additional, presumably black. On page 75, the trial judge pointed out that to the regular total of 7,006 must be added the 585 registered federally, which would demonstrate that at least 50%, actually slightly more, of the registered voters were black in 1972.

This statement will be included in an appendix to this brief, certified by counsel, which we hope will be acceptable to the Court.

On page 10 of petitioners' statement there is a complaint of discrimination against blacks in employment, stating that only "one to three blacks out of sixty employed *among civil service,*" including firemen and policemen, were employed. This overlooks the fact that these are "classified employees" within the meaning of Act 248, Alabama Acts of 1945, creating a Personnel Board for all communities in counties of 400,000 or more in population (including Jefferson County) (see Appendix 1 to this brief), prescribing that applicants to all classified positions (civil service) must take examinations and only three of the applicants for the position are submitted by the Personnel Board to the appointing authority (in this case, the City of Fairfield) for a position, which is confined to choosing one of the three. The District Court pointed to this fact, that is, the authority of the "civil service" board, page 118a, and stated:

> "Of course there are problems that the city has brought out about some of its hiring policies, and many of them are very dependent upon what some other agent, namely, civil service, may do. Evidence indicated only in one instance has there been a black on the qualification list who has been passed over in recent years in favor of a white."

He undoubtedly had in mind this statutory restriction governing appointment of classified employees by the City. Policemen and firemen, as are all city employees not defined in the Act as unclassified, are under civil service.

Accordingly, the Court would not have been justified in saying, if he had done so, that as of 1968 and 1972 there was discrimination in employment on the part of the officials of the city as to civil service employees (the only complaint made). No such finding was made after the remand.

On the first hearing (122a), the District Court concluded that he:

> ". . . ends up with the proposition that the various standards and indicia that have been prescribed by the appellate courts are not helpful one way or the other in this case. And it ends up with this Court having to decide under the basic standards, does the present system, *regardless of purpose*, operate to minimize or cancel the voting strength of the blacks in the City of Fairfield." (emphasis added).

On account of such an opinion the judgment was reversed, the Court of Appeals reasoning that the trial court's findings were insufficient to support the judgment for plaintiffs and holding that none of them was clearly erroneous (although the opinion below dealt with all of the

major factors in *Zimmer),* characterized as being in favor of defendants with the "possible" exception of "unresponsiveness".

How can it be logically contended that the trial court, after remand, made, or purported to make, or had the authority to make, any such finding of "ultimate fact" under *White v. Regester,* having made findings and rendered judgment for defendants? The facts in the two cases were entirely different and the most that can be said is that the District Court, in the first hearing, construed or interpreted *White v. Regester* as meaning that even in the absence of fraud and without racial motivation, the effect of the result of the election itself showed invidious discrimination and dilution.

Arguing that the District Court found a discrimination to making appointments so that boards would become majority dominated by blacks, petitioners state in the last sentence on page 10, that "These findings on responsiveness were affirmed." The record does not show that there was any affirmance at all.

We think the other matters in petitioners' Statement of the Case have been sufficiently answered.

ARGUMENT IN OPPOSITION TO REVIEW BY CERTIORARI AND THE GRANTING OF THE WRIT

Petitioners' prime reasons are given as I and II. The first, p. 11, is:

I. The Court of Appeals opinions here departed from *White v. Regester*, 412 U.S. 755 (1973), and other holdings of this court.

The first subdivision under I is entitled:

A. *Fifth Circuit precedent since White v. Regester,* and petitioners state thereunder that the Supreme Court has dealt with the constitutionality of multi-member districts in only two cases, *White v. Regester,* 412 U.S. 755 (1973) and *Whitcomb v. Chavis,* 403 U.S. 124 (1971). There is a statement as to what *White* held, p. 11, and that statement in no wise conflicts with the opinion facts or principles involved in *Nevett v. Sides.*

We submit that *Whitcomb v. Chavis* has little, if any, effect upon the issues in the case now before the Court.

We do not perceive that anything in substance will be accomplished by a discussion of the Fifth Circuit opinions cited, as all preceded *Nevett v. Sides* now before the Court.

On page 14, the petitioners say that *Kirksey,*[2] in considering the effect of *Washington v. Davis* and *Village of Arlington Heights v. Metropolitan* (dealing with the factor of intent of purposeful discrimination, we suppose), concluded:

> " 'the Dallas and Bexar County plaintiffs in *White v. Regester* were successful, even though they did not prove the plan in question was a *Gomillion v. Lightfoot* [364 U.S. 339 (1960)] type of racial gerrymander, because they established the requisite intent or purpose in the form of the existent denial of access to the political process. 554 F.2d at 148.' "

We have little doubt that a persistent denial of access to the political process is to be inferred or presumed to be purposeful and we have no comment to the contrary.

No such element exists in *Nevett v. Sides,* according to all the findings of fact in the district and appeal courts decisions.

I-B, p. 15, of the petition contends that the Court of Appeals failed to apply the law of burden shifting as required

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[2]559 F.2d 139 (5th Cir.) (en banc), *cert. denied,* 434 U.S. 968 (1977).

by *Mt. Healthy City School District v. Doyle,* 429 U.S. 274 (1977).

The holding in that case is sufficiently set out in the initial statement preceding the headnotes.[3]

This holding, we submit, bears no analogy to *Nevett v. Sides,* on the facts or the question of burden of proof in this case.

On page 15, same topic, is the following statement pertaining to *White v. Regester* and *Whitcomb v. Chavis*:

> "*White v. Regester,* 412 U.S. 755 (1972), and *Whitcomb v. Chavis,* 403 U.S. 124 (1971), indicate that the order of proof in challenging an at-large system is that plaintiffs need to show:
>
> '1. racially polarized voting that, combined with the at-large system, operates to deprive the minority of the seats it could be expected to win with single-member districts.
>
> 2. That blacks have had less opportunity than did other residents to participate in the political process.' "

We find no such supporting statements in these cases on that score, and respondents do not conceive that any more

[3]"An untenured teacher, having been discharged from his employment, brought an action against his former employer for reinstatement and damages, claiming that the school district's refusal to rehire him violated his rights under the First and Fourteenth Amendments. The District Court found that the teacher's exercise of his right of free speech had played a substantial part in the board of education's decision not to rehire the teacher, and that he was entitled to reinstatement with back pay, and the Court of Appeals, 529 F.2d 524, affirmed. The Supreme Court, Mr. Justice Rehnquist, held, inter alia, that the fact that constitutionally protected conduct played a substantial part in the decision not to rehire the teacher did not necessarily amount to a constitutional violation justifying remedial action, and that the district court should have gone on to determine whether the board of education had shown by a preponderance of the evidence that it would have reached the same decision even in the absence of protected conduct by the teacher.

Vacated and remanded."

explicit answer is required in regard to the bare unsupported conclusion drawn by petitioners.

We are unable to ascertain where *Gaffney v. Cummings*[4] has any application to the subject. As to *Kirksey,* in *Nevett v. Sides,* the case on review, the Court of Appeals has observed no obstacle therein. *Kirksey,* in reality, applied to a system that was already court-established, and in any case, there is a wide divergence in the facts of the two cases. Furthermore, it precedes *Nevett v. Sides,* 571 F.2d 209, with which we are now concerned.

The last subdivision (C) of I, on page 19 of the petition, asserts that the Court failed to apply the "strict scrutiny" test to the evidence as required by this Court, citing *Reynolds v. Sims,* 377 U.S. 533 (1964) (a reapportionment, one-man, one-vote case, dependent purely on statistics and disparity in district population), and other cases, or "where there is proof of racial discrimination", citing *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252.

There is no need further to deal with *Reynolds v. Sims,* and as to *Arlington Heights* we can only say that there is no proof of racial motivation under the decisions in *Nevett v. Sides.*

On page 21 of the petition it is stated that the ultimate conclusion as to whether unconstitutional dilution exists is not subject to the "clearly erroneous rule", citing *Neil v. Biggers,* 409 U.S. 188, 193, 93 S.Ct. 375 (1972).

Neil v. Biggers has nothing to do with voter dilution. It invokes a habeas corpus proceeding involving an effort to attack the admissibility and effect of an identification of defendant in a criminal rape charge. There it was argued that the Supreme Court should not depart from its "long established practice not to reverse findings of fact concurred

[4]412 U.S. 735 (1973).

in by two lower courts unless shown to be clearly erroneous". The Court recognized this as a salutary rule not to be overturned where applicable, fn. 3, p. 379, 93 S.Ct., but said that the rule is "inapplicable here where the dispute between the parties is not so much over the elemental facts as over the constitutional significance to be attached to them." In an opinion (one of the opinions) it was stated that the situation constituted "an unjustified departure from our long established practice not to reverse findings of fact concurred in by two lower courts unless shown to be clearly erroneous", citing at least seven decisions commencing with *Blau v. Lehman,* 368 U.S. 403, 82 S.Ct. 431, 454-455, and ending with *Boulden v. Holman,* 394 U.S. 478, 480-481, 89 S.Ct. 1138-1140, 22 L.Ed.2d 433.

Respondents submit that this long-established rule applies to the case at bar, involving essentially factual findings by the U.S. District Court and the Court of Appeals, and not clearly erroneous, a salutary reason for declining to review the subject case on certiorari.

In view of the discussions in the District Court and Court of Appeals pertaining to the "enhancing" factors, which do not in themselves show "invidious discrimination", something should be said.

The "majority vote" requirement is discussed by the District Court at 62a, and the "anti-single shot" provision and numbered position approach are discussed at pp. 62 and 63a. The District Court found that they did not affect his conclusion that the "aggregate" of the facts under *Zimmer* had not been proved.

In 1961, Alabama abolished all anti-single shot provisions. The Act (Act No. 221, General Acts of Alabama of 1961) has been previously quoted.

There is a majority vote requirement for each place, but where there are two or more candidates, none receiving a

majority in the first election, a run-off election is held between the two candidates receiving the highest number of votes (Title 37, §34(54), Alabama Acts of 1961, No. 36, p. 856, Title 37, §34(54), 1958 Code, as amended, Pocket Part). Frankly, we see nothing invidious or insidious about this.

As far as running for Place I and Place II in the *same ward,* two councilmen being required to be elected, there is no anti-single shot provision, and the places are restricted to each ward. We perceive nothing invidious about this. All voters, or group of voters, may concentrate on voting en masse for and electing any one candidate for any place in any ward, all city voters voting at large. The anti-single shot provision applies to places in each ward and all other offices.

The District Court had held in its first decision that the predecessor of §426, Title 37, passed by the Legislature in 1909, or in any case the particular provision specifying at-large elections in cities of less than 20,000, had no racial overtones. "This was a reasonable hypothesis", said the Court (see District Court opinion in *Nevett v. Sides,* 533 F.2d at page 1371). The Court of Appeals, 571 F.2d at p. 221, accepted this finding, "that the 1909 plan was adopted without discriminatory intent", and, of course, affirmed the judgment for defendants.

Pertaining to the rationale of at-large elections in municipal elections, the Fifth Circuit, in *Wallace v. House,* 515 F.2d 619 (1975), said, at page 633:

> "The reason usually given in support of at-large elections for municipal offices is that at-large representatives will be free from possible ward parochialism and will keep the interests of the entire city in mind as they discharge their duties . . . we cannot say that the rationale is so tenuous that it can be disregarded. Nor have plaintiffs demonstrated that the at-large device

here was conceived as a tool of racial discrimination as appeared to be the case in *Zimmer* and *Turner*."

This demonstrates the meaning of the word "tenuous" used in dilution cases, as well as a logical reason for such a system.

After discussion of *Zimmer* and the factor of "intent as an element", the Court concludes (p. 229, 571 F.2d):

> "Under these particular circumstances, the district court's conclusion that 'there has been no evidence that the claimed 'dilution' was the result of any invidious discriminatory purpose' (citing *Davis*) is wholly warranted. The failure to establish the existence of intentional discrimination follows naturally from the factual determinations under *Zimmer* in this case.
>
> This case, then, falls squarely within the principle established in *Wright* and reaffirmed in *Davis* and *Arlington Heights*. In the aggregate, the *Zimmer* criteria do not point to a racially motivated dilution. Absent a showing that intentional discrimination was a motivating factor in either the enactment or maintenance of the plan, these appellants cannot succeed.
>
> The district court's judgment is therefore AFFIRMED."

Petitioner's second reason, given as No. II, pp. 21-28 of petition, is:

II. Review should be granted to decide the necessity and nature of proof of intent in cases alleging dilution of a racial group's votes.

In response to the argument under this reason, respondents commend that portion of the opinion of the Court of Appeals commencing with II on p. 217, 571 F.2d, and ending near the bottom of page 225, holding that an at-large plan must be shown to be racially motivated as a prerequisite to a successful attack, both under the Fourteenth

and Fifteenth Amendments, approving, inter alia, *Wright v. Rockefeller*, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964), *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265, 97 S.Ct. 555, 563, 50 L.Ed.2d 450 (1977), as applying to the Fifteenth Amendment, as well as the Fourteenth, in a dilution case.

On page 21, petitioners state that *Wright v. Rockefeller* does not require proof of intent. This was a gerrymandering case and the majority opinion held that the plaintiffs had not met the burden of proof that the districting was racially motivated. Petitioners' statement is perplexing.

We also cite *Dallas County, Ala., et. al. v. Reese*, et al., 421 U.S. 477, 44 L.Ed.2d 312, 95 S.Ct. 1706, and *Dusch, et al., v. Davis, et al.*, 387 U.S. 112, 18 L.Ed.2d 656, 87 S.Ct. 1554, Fourteenth Amendment voter dilution cases which come very close to saying, if not categorically, that the discrimination must be intentional. They are not race cases but involve claimed dilution of white voters rights.

It is interesting to note the statement made in *Whitcomb v. Chavis*, strongly relied upon by petitioners, as follows (at p. 149, 403 U.S. 148, at p. 1872 of 91 S.Ct.):

> "First, it needs no emphasis here that the Civil War Amendments were designed to protect the civil rights of Negroes and that the courts have been vigilant in scrutinizing schemes allegedly conceived or operated as purposeful devices to further racial discrimination."

Justice Stewart, in a concurring opinion in *United Jewish Organizations, etc. v. Carey*, 430 U.S. 144 (1977), 97 S.Ct. 996, at page 1017, said:

> "Under the Fourteenth Amendment the question is whether the reapportionment plan represents purposeful discrimination against white voters. *Washing-*

> *ton v. Davis,* 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597. Disproportionate impact may afford some evidence that an invidious purpose was present. *Arlington Heights v. Metropolitan Housing Development Corp.,* ____ U.S. ____, 97 S.Ct. 555, 50 L.Ed.2d ____, *ante,* p. 1016."

Under our view, there should be no difference between the protection afforded under the Fourteenth Amendment and that under the Fifteenth, of the right to vote.

Respondents assign the following reasons for the Court's refusal to review the Court of Appeals in this case by grant of the writ pursuant to Rule 19:

1. The Court of Appeals has not rendered a decision in conflict with the decision of another court of appeals on the matter, has not decided an important question of federal law which has not been and should be settled by this Court, and has not decided a federal question in a way which is in conflict with applicable decisions of this Court.

2. Furthermore, to grant the writ would constitute an unjustified departure from the Court's long standing practice not to reverse findings of fact concurred in by two lower courts unless shown to be clearly erroneous.

3. By way of a specific objection to a review and attack upon the opinion and judgment of the Court of Appeals rendered on June 8, 1976 in *Nevett v. Sides,* 533 F.2d 1361, respondents assert that the petition for review is not filed within the time prescribed by statute, §2101 (c) , Title 28, of the United States Code.

We, of course, do not know what view this Court will take pertaining to the Fifth Circuit factors or guidelines established in *Zimmer* and the other decisions of the Fifth Circuit. Respondents assert, however, that if the rule of *Zimmer* is to govern, defendants have met the test under findings of fact that are not clearly erroneous, regardless of

the question whether purposeful discrimination is essential. If such factor is essential, the District Court's findings of June 11, 1976 enunciate the presence of such a factor.

CONCLUSION

Respondents, defendants below, pray that the petition for certiorari be denied and the writ not issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 17th day of November, 1978, three (3) true and correct copies of the foregoing Brief of Respondents in Opposition to Review of the Cause sought by Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were served on counsel for petitioners by depositing the same in the United States Mail, with Air Mail postage prepaid, and addressed to the respective parties at their post office addresses as follows:

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REID B. BARNES

APPENDIX I

PERTINENT PORTIONS OF ACT NO. 248, GENERAL ACTS OF ALABAMA OF 1945, ESTABLISHING A PERSONNEL BOARD IN EACH COUNTY IN ALABAMA HAVING A POPULATION OF 400,000 OR MORE, AND PROVIDING, INTER ALIA, FOR THE APPOINTMENT OF CLASSIFIED (CIVIL SERVICE) EMPLOYEES IN THE COUNTY AND ALL MUNICIPALITIES THEREIN.

Section 2. Personnel Board; extent of its authority defined. In and for each separate county of the State of Alabama which has a population of four hundred thousand or more people according to the last or any future federal census, there shall be a personnel board for the government and control by rules and regulations and practices hereinafter set out or authorized of all employees and appointees holding positions in the classified service of such counties and the municipalities therein whose population according to the last federal census was five thousand or more, and the County Board of Health, and such personnel board is vested with such power, authority and jurisdiction. Provided, however, that such board shall not govern any officers or appointees holding positions in the unclassified service. . . .

* * *

Section 18. Appointments. Vacancies in the classified service shall be filled either by transfer, promotion, appointment, reappointment or demotion. Whenever a vacancy in an existing position is to be filled by appointment, the appointing authority shall submit to the director a statement of the title of the position, and if requested by the director to do so, the duties of the position and desired qualifications of the person to be appointed, and a request that the director certify to him the names of per-

sons eligible for appointment to the position. The director shall thereupon certify to the appointing authority the names of the three ranking eligibles from the most appropriate register, and if more than one vacancy is to be filled the name of one additional eligible for each additional vacancy, or all the names on the register if there are fewer than three . . . Within ten days after such names are certified the appointing authority shall appoint one of those whose names are certified to each vacancy which he is to fill. . . .

NOTE: Policemen and firemen are classified employees within the meaning of the Act.

APPENDIX II

The undersigned attorney for respondents certifies that, as shown in part on pages 60 and 61 of the appendix in the United States Court of Appeals for the Fifth Circuit, submitted as a part of the record in *Nevett v. Sides,* 571 F.2d 209, witness Jerry D. Coleman testified that the total number of white registered voters for the City of Fairfield in 1972 was 3,794 and the blacks, 3,212, appearing on the regular registration records of the county, a total of 7,006; and also testified that, in addition thereto, there were 585 voters registered in categories 5 and 6. On page 75, the trial judge, Honorable Sam C. Pointer, Jr., made the following statement in open court: (same appendix on both appeals):

> "I believe that the 7,006 merely gives categories 1, 2, 3 and 4, and you would have to add another 585."

Attached hereto are true copies of pages 60 and 61, showing what has been said above, and also page 75, showing the Court's statement.

See opinion in *Nevett v. Sides,* 533 F.2d, at page 1365, characterizing the 585 voters as being those registered by federal examiners (presumably black).

The District Court, in his opinion, at p. 1367, 533 F.2d, "assumes" that of "persons who were registered under the Federal Registration Voters Procedure, virtually all of those were black."

(s) REID B. BARNES

[96] THE COURT:

To vacancies, and one of the five members for the citizens advisory committee?

A Yes.

* * * *

JERRY D. COLEMAN,

* * * *

and black.

Q District 1, white, 1,141; blacks, 217.
District 2, white, 129; blacks, 2,906.
District 3, white, 2,524; blacks, 89.

Q Now what was the total number of whites for the city?

A The total number of whites for the city was 3,794. The total number of blacks was 3,212.

Q What is the difference between blacks and whites?

A A difference of 582.

Q Now were the number of — were the 5's and 6's included in those racial breakdowns?

A 5's and 6's were included.

Q How did you go through and identify those people as black or white that were listed as 5's or 6's?

A I didn't identify the 5's and 6's as either being black or white.

Q You just told me that they were included in this breakdown? [111]

[111] A They are included in the overall figure, but not racially.

Q Oh, I'm sorry, excuse me.

All right. Did you go through and count up the number of 5's and 6's on that list?

A Yes, I did.

Q And how many 5's and 6's are there as a total in the July, 1972 list?

A 5's and 6's total 585.

Q All right. Now did you also go through the June 1974 voting list?

A Yes, I did.

Q All right. Would you give us the black-white breakdown for each district at that time?

A District 1, white, 1,036; black, 228.
District 2, white, 95; black, 2,833.
District 3, white, 2,594; black, 88.
Total citywide, white, 3,725; black, 3,149. The difference of 576.

Q All right. Did you go through that list and count up the number of people who were 5's and 6's?

A June, '74?

Q Yes, sir.

A No, I didn't for June of '74.

Q At the end of the list that was provided to you by [112] [170] of education .

Q And when was that?

A This was during the vacancy, one of the vacancies. I don't recall which vacancy.

Q Was this before '72 or since '72?

A It has been since '72.

Q Since this present council has been in office?

A Let me be sure. I believe it was during this present council.

Q You think it was during this present council?

A Yes.

Q Was that when Ms. Coleman's position came open?

A I don't recall which position it was. But I did submit a letter.

Q Was it when the council first was organized or first went into office?

* * * *

that as a category as 5 and 6?

MR. BARNES:

Well, they have—

THE COURT:

I believe that the 7,006 merely gives categories 1, 2, 3 and 4, and you would have to add another 585.

MR. BARNES:

Maybe you would have to add those. But whether you had [203].